**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

D. R. HORTON, INC.

and Case 12-CA-25764

MICHAEL CUDA,
an Individual

# ACTING GENERAL COUNSEL'S REPLY BRIEF TO RESPONDENT'S ANSWERING BRIEF

Submitted by:

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## I. INTRODUCTION

Administrative Law Judge William N. Cates (the ALJ) issued his Decision in this case on January 3, 2011, reported at JD(ATL 32-10). On March 14, 2011, Counsel for the Acting General Counsel filed exceptions and a supporting brief with respect to the ALJ's failure to find that Respondent's overly broad mandatory arbitration agreement, violated Section 8(a)(1) of the Act in certain respects and with respect to the ALJ's failure to recommend certain remedies. [1] On April 11, 2011, Respondent filed an answering brief. Counsel for the Acting General Counsel submits this brief in reply to Respondent's answering brief.

This brief addresses Respondent's claim that the General Counsel's position contradicts both court precedent and General Counsel Memo 10-06,[2] and Respondent's objection to a corporate-wide remedy.[3]

## II. ARGUMENT

### A. The Acting General Counsel's position is consistent with court precedent and with General Counsel's Memorandum 10-06.

Respondent inaccurately characterizes the Acting General Counsel's position, as set forth in the exceptions and supporting brief, as inconsistent with precedent and with the guidelines articulated in General Counsel's Memorandum 10-06, issued on June 16, 2010. Respondent is correct that "an individual employee's agreement not to utilize class action procedures in pursuit of purely personal individual claims does not involve a waiver of any Section 7 rights, and that no Section 7 right is violated when an employee

[1] Respondent filed exceptions and a supporting brief with respect to the ALJ's findings that its mandatory arbitration agreement violated Section 8(a)(1) and (4) of the Act in other respects, and Counsel for the Acting General Counsel filed an answering brief thereto.
[2] See Section A, points 1 and 2 at pages 5-10 of Respondent's answering brief.
[3] See Section B, point 2 at pages 15 to 17 of Respondent's answering brief.

possessed of an individual right to sue enters such a *Gilmer*[4] agreement as a condition of employment and that agreement is later enforced. Thus, Counsel for the Acting General Counsel does not contend that the language in paragraph 6 of Respondent's Mutual Arbitration Agreement (MAA) is per se unlawful. As stated at page 7 of the brief in support of exceptions, an employer has the right to limit arbitration to individual claims – as long as it is clear that there will be no retaliation for concertedly challenging the agreement. The latter element is missing from the MAA.

The issues raised in this case were not squarely presented in *Gilmer* or the other court cases cited by Respondent. For the reasons explained in the Acting General Counsel's exceptions and brief in support of exceptions, and for the additional reasons stated in the ALJ's Decision and the Acting General Counsel's answering brief to Respondent's exceptions, Respondent's "Mutual Arbitration Agreement" (MAA) is overly broad and violates Section 8(a)(1) and (4) of the Act. (JX-2).[5] Thus, an employee can reasonably construe the MAA, read in its entirety, as prohibiting the filing of a class action, collective action, or joint action lawsuit in order to challenge the validity of the agreement itself in a tribunal outside of Respondent's dispute resolution process, in violation of Section 8(a)(1) of the Act. Further, the language of the MAA, on its face, leads employees to reasonably believe they cannot file charges with the Board, in violation of Section 8(a)(1) and (4) of the Act. In summary, the Acting General Counsel's position is consistent with extant case law, including *Gilmer*, and with General Counsel's Memorandum 10-06.

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[4] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
[5] As used herein ALJD refers to the ALJ's Decision, JX refers to a joint exhibit, GC refers to a General Counsel's exhibit, and T refers to the official transcript.

**B. A corporate-wide remedy is appropriate.**

Respondent argues in Section B-2 at pages 15 to 17 of its answering brief that there is insufficient evidence in the record to justify the imposition of a corporate-wide remedy. This contention is simply inaccurate.

As the ALJ found, in 2006, on a corporate-wide basis, Respondent implemented a policy of requiring each current and new employee to sign the MAA as a condition of employment. (ALJD p.2, L.23-25). The ALJ's finding is amply supported by the record. Kathleen Shippey, Respondent's Chief Financial Officer and Assistant Corporate Vice President, testified that the Mutual Arbitration Agreement was "rolled out **company-wide** in January of 2006." (T 32-33, emphasis added). In addition, as noted in General Counsel's Exception 2, on January 3, 2008, Respondent counsel Tricarico sent an electronic mail message to Charles Scalise, counsel for Charging Party Michael Cuda, stating, "Attached is the Arbitration Agreement. **Everyone in the company** has executed the same Agreement." (GCX-2; T 21-24, emphasis added). Finally, at the hearing Respondent signed a stipulation which was entered into the record, and states, in relevant part:

> In or around January 2006, Respondent began requiring its employees to execute a Mutual Arbitration Agreement as a condition of employment, which is attached hereto and has been offered into evidence as Joint Exhibit 2. Since in or around January 2006, and continuing to date, Respondent has required its employees to execute a Mutual Arbitration Agreement (Joint Exhibit 2) as a condition of employment.

(JX 1).

Although Respondent claims that there is no record testimony regarding the method that Respondent's Mutual Arbitration Agreement was maintained outside its

Jacksonville, Florida division, the above-cited testimony of Respondent witness Shippey and the electronic mail message sent by Respondent counsel Tricarico demonstrate that the MAA was implemented and maintained on a corporate-wide basis. In addition, the above-quoted stipulation is not limited to Respondent's employees in the Jacksonville division, or to any other sub-group of Respondent's employees. The evidence shows that Respondent admittedly distributed the facially unlawful agreement on a corporate-wide basis, was admittedly maintaining that agreement on a corporate-wide basis as of January 2008, and as of the time of the hearing.[6]

These facts also establish the need for a corporate-wide remedy, including corporate-wide Notice to Employees, regardless of the manner of distribution or the extent of enforcement of the agreement outside the Jacksonville division. The mere maintenance of an overly broad rule or policy, even if it is not enforced, constitutes unlawful interference with employees' Section 7 rights, in violation of Section 8(a)(1) of the Act. *Cintas Corp.*, 344 NLRB 943, 946 (2005), enfd. 482 F.3d 463, 468 (D.C. Cir. 2007); *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998). Where an unlawful rule or policy like Respondent's MAA is maintained on a corporate-wide basis, a corporate-wide remedy is appropriate.[7] *Fresh & Easy Neighborhood Market*, 356 NLRB No. 85,

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[6] There is no evidence or representation by Respondent to the effect that it has not continued to date to require its employees, on a corporate-wide basis, to execute the MAA as a condition of employment.

[7] The cases cited by Respondent at page 16 of its answering brief are inapposite because the unfair labor practices in those cases were discrete and limited to a single location, unlike the instant case where the unfair labor practices occurred on a corporate-wide basis and therefore have had a corporate-wide impact. *Read's, Inc.*, 228 NLRB 1402 (1977); *Beverly Health & Rehabilitation Services*, 339 NLRB 1243, 1244 (2003); *John J. Hudson, Inc.*, 275 NLRB 874 (1985). It is true that a broad Board order and the posting of notices at employer facilities not directly involved with the specific unfair labor practices being remedied may be required in cases involving respondents with a demonstrated proclivity to violate the Act. *Beverly Health & Rehabilitation Services,* 335 NLRB 635, 640 (2001), enfd. in pertinent part 317 F.3d 316 (D.C. Cir. 2003); *J.P. Stevens & Co.*, 245 NLRB 198 (1979), enfd. in relevant part 638 F.2d 676 (4th Cir. 1980). However, that line of cases has no bearing on the remedy sought in the instant case, where the unfair labor practices were committed throughout the company.

slip op. at 1, fn.1 (2011); *Cintas Corp.*, 344 NLRB 943, 944 (2005), enfd. 482 F.3d 463, 468 (D.C. Cir. 2007).

## III. CONCLUSION

In conclusion, Respondent's assertions that the Acting General Counsel's position in this matter is inconsistent with court precedent and with the guidelines set forth in General Counsel's Memorandum 10-06 are erroneous, and the evidence establishes that a corporate-wide remedy is appropriate to eradicate the impact of Respondent's unfair labor practices. Counsel for the Acting General Counsel respectfully submits that the Board should reject the arguments put forth in Respondent's answering brief in their entirety.

Dated at Miami, Florida this 25th day of April, 2011

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that Counsel for the Acting General Counsel's Reply Brief to Respondent's Answering Brief was duly served upon the following individuals by electronic transmittal on April 25, 2011:

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